IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PAUL ZIMNOCH, Plaintiff	:	CIVIL ACTION
v.	:	
ITT HARTFORD, et al. and HARTFORD ACCIDENT AND LIFE INSURANCE and THE HARTFORD, Defendants	:	NO. 99-6594

Newcomer, S.J. March , 2000

M E M O R A N D U M

Presently before this Court are defendants' Motion to Dismiss, plaintiff's Opposition to Removal, plaintiff's Motion for Remand and in the alternative, Opposition to defendants' Motion to Dismiss, Defendants' Opposition to plaintiff's Motion for Remand, and in the alternative, Defendants' Motion to Amend Petition of Removal. For the reasons set forth below, plaintiff's Motion to Remand the case back to state court is DENIED, but plaintiff's request for leave to amend his Complaint to set forth a cause of action under ERISA is GRANTED. Defendants' Motion to Dismiss is DENIED at the present time without prejudice.

I. BACKGROUND

Plaintiff is a former employee of Oracle Corporation. In his Complaint, plaintiff alleges that as part of his employment contract, he was issued long term disability benefits under an insurance policy issued by defendants which provides long term disability payment as a result of any disability incurred while in the employment of Oracle. In 1995, plaintiff

became medically disabled and submitted to defendant, Hartford Insurance Company, a claim for long term disability benefits.

Plaintiff alleges that later in 1995, defendants wrongfully, arbitrarily and/or capriciously and contrary to their contractual obligation and/or in breach of their fiduciary duty denied plaintiff's claim. Subsequently, plaintiff has not been paid any of his long term disability benefits to which plaintiff is allegedly entitled pursuant to the policy of insurance and contract. On November 24, 1999, plaintiff filed his Complaint against defendants in the Court of Common Pleas of Philadelphia County, Pennsylvania. Plaintiff filed the instant action alleging causes of action for: (1) violation of the Pennsylvania Unfair Insurance Practice Act; and (2) bad faith under 42 Pa. C.S.A. § 8371.

On December 28, 1999, pursuant to 28 U.S.C. § 1441 defendants filed a timely Notice of Removal to this Court based on defendants' contentions that plaintiff's statutory actions as pled in his Complaint are displaced by the Federal Employment Retirement Income Security Act ("ERISA"). Defendants now move to dismiss the Complaint, arguing that both of plaintiff's state law claims are preempted by ERISA. Plaintiff moves this Court to remand the case back to state court, or in the alternative to grant leave to amend his Complaint to set forth a cause of action under ERISA.

II. DISCUSSION

A. PLAINTIFF'S OPPOSITION TO REMOVAL AND MOTION TO REMAND

Plaintiff opposes defendants' removal of this action

from state court to this Court by asserting that: (1) defendants should be equitably estopped from removal based on the terms of The Policy drafted by the defendants; (2) defendants, when petitioning for removal, failed to carry their burden of demonstrating the existence of federal jurisdiction, namely that The Policy and plaintiff's claims are preempted by ERISA; and (3) even if defendants met their burden, plaintiff's bad faith claim is still not preempted by ERISA because of the "savings clause" of ERISA.

1. EQUITABLE ESTOPPEL: THE POLICY'S TERMS

Plaintiff's first argument opposing removal relies on a statement on page 21 of The Policy which indicates that an insured with a claim "for benefits which is denied or ignored, in whole or in part . . . may file suit in a state or federal court." Plaintiff argues that the explicit terms of The Policy estop defendants from removing an action such as the instant one. Plaintiff contends that The Policy's terms represent a tacit acknowledgment that Hartford is subject to a state's insurance regulations and that state courts have concurrent jurisdiction with federal courts over actions brought under 29 U.S.C. § 1132(e)(1) which permits plaintiff to choose the forum and initiate suit in state court.

This Court does not deny that state courts have concurrent jurisdiction over actions such as the instant one. This Court also agrees that defendants should be obligated to comply with any contractual obligations made in The Policy. However, this Court does not find that defendants violated any

contractual language by petitioning for removal in this case. The language of The Policy merely states that plaintiff may file suit in a state or federal court. Defendants clearly allowed plaintiff to file suit in state or federal court - plaintiff chose to file suit in state court. The Policy is silent, however, as to defendants choosing to remove any suit filed by plaintiff in state court. In fact, barring any contractual obligations, defendants have a statutory right to removal, if such removal is proper. Accordingly, this Court determines that defendants are not equitably estopped from removing this action.

2. BURDEN OF PROVING FEDERAL JURISDICTION

Plaintiff also argues that defendants failed to carry their burden of proving the propriety of removal by failing to show that this Court has subject matter jurisdiction over the instant action.

Removal of a civil action is proper when the district court would have had "original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1441; Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). The burden to show that federal subject matter jurisdiction exists and that removal is proper is on the removing party. See Boyer v. Snap-on-Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085 (1991). An action removed to federal court may be remanded to state court "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction . . . ." 28 U.S.C. § 1447(c). In addition, "removal statutes 'are to be

construed against removal and all doubts resolved in favor of remand.'" Id. (citation omitted).

In order to determine whether a claim "arises under" federal law, courts rely on the "well-pleaded complaint rule." See Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10 (1983) ("Whether a case is one arising under the Constitution or a law or treaty of the United States . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill of declaration."). Generally, a defense raising a federal question is inadequate to confer federal jurisdiction; as a defense, it does not appear on the face of a well-pleaded complaint, and therefore does not authorize removal to federal court. See Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). However, the complete preemption doctrine serves as a corollary to the well-pleaded complaint rule. Under that doctrine, Congress may so completely preempt a particular area that any complaint raising claims in that area is necessarily federal in character. See Metropolitan Life, 481 U.S. at 63-64; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Goepel v. National Postal Mail Handlers Union, 36 F.3d 306, 309-13 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995). Moreover, the Supreme Court has determined that Congress intended the complete-preemption doctrine to apply to state law claims that fit within the scope of ERISA's civil enforcement provisions. See Metropolitan Life, 481 U.S. at 64.

In the instant case, defendants' Notice of Removal

makes the bare allegation that the action brought by plaintiff:

> involves a controversy over which this Court . . . has original jurisdiction in that it is a controversy that arises under the Employment Retirement Income Security Act . . . . Plaintiff's common law actions, as pled in the Complaint, have been displaced by the Federal ERISA statute and therefore arises under that statute and is removable to Federal Court regardless of how Plaintiff framed his action.

Plaintiff is correct in that defendants do not explain or support in their Notice of Removal how this Court has subject matter jurisdiction over this action. In fact, when read literally, plaintiff's Complaint only asserts two state law claims and does not refer to any federal question upon which defendants can rely to satisfy subject matter jurisdiction requirements for removal. Applying the well-pleaded complaint rule, it is clear that defendants did not have notice of any federal question claims from the Complaint, but rather presumes in their Notice of Removal that their defense - that ERISA preempts plaintiff's state law claims - provides the necessary subject matter jurisdiction. However, under the complete preemption doctrine, in order to determine whether this Court has proper subject matter jurisdiction over the claims in plaintiff’s Complaint, this Court must determine whether plaintiff’s state law claims are in fact preempted by ERISA. If the state law claims are preempted by ERISA they are considered necessarily federal in character, thereby giving this Court subject matter jurisdiction over the action and making removal of this action proper.

a. ERISA PREEMPTION: LEGAL STANDARD:

ERISA broadly supersedes and preempts all state laws that relate to an employee benefit plan. 29 U.S.C. § 1144(a);

see also Kearney v. U.S. Healthcare, Inc., 859 F.Supp. 182, 184-85 (E.D. Pa. 1994) ("However characterized, . . . claims which arise from the manner in which defendants administered benefits or which are premised on the type or extent of benefits defendants promised or provided are preempted."). To demonstrate that a state law claim is preempted, a defendant must prove that the employee benefit plan is an ERISA plan and that plaintiff's state law claims "relate to" an ERISA plan. Pierson v. Hallmark Marketing Corp., 990 F.Supp. 380, 390 (E.D. Pa. 1997).

b. DOES THE POLICY QUALIFY AS AN ERISA PLAN?

Plaintiff argues that defendants failed to submit evidence that The Policy qualifies as an ERISA plan. "The existence of an ERISA plan is a question of fact, to be answered in the light of all the surrounding circumstances from the point of view of a reasonable person." Zavora v. Paul Revere Life Ins. Co., 145 F.3d 1118, 1120 (9th Cir. 1998). ERISA defines the term "employee benefit plan" as an "employee welfare benefit plan or an employee pension benefit plan or a plan which is both . . . ." 29 U.S.C. § 1002(3). ERISA defines an "employee welfare benefit plan" as:

> [A]ny plan, fund, or program which was . . . or is . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death . . . or (B) any benefit described in § 302 of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions.

29 U.S.C. § 1002(1) (1998).

A disability insurance program falls under ERISA if (1) a "plan, fund, or program" exists, (2) the safe harbor regulations do not apply, and (3) the employer "established or maintained" the plan with the intent to provide benefits to its employees. See Thompson v. American Home Assurance Co., 95 F.3d 429, 434-35 (6th Cir.1996); Meredith v. Time Ins. Co., 980 F.2d 352, 355 (5th Cir.1993). "[A] 'plan, fund or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Deibler v. United Food & Commercial Workers' Local Union 23, 973 F.2d 206, 209 (3d Cir.1992) (quoting Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir.1982)).

In the instant case, this Court determines from the portions of The Policy that have been submitted as exhibits that a "plan, fund or program" existed. A reasonable person could readily determine that The Policy covered long term disability benefits; the class of beneficiaries is ascertainable as regular full-time or part-time Oracle employees scheduled to work at least 20 hours a week; employer's payments of the premiums with the option of allocating part of the cost to the employee constitutes the source of financing; and the procedure for receiving benefits is outlined in The Policy.

However, "just because a plan exists does not mean that it is an ERISA plan." Gaylor v. John Hancock Mut. Life Ins. Co., 112 F.3d 460, 464 (10th Cir. 1997) (quoting Hansen v. Continental Ins. Co., 940 F.2d 971, 977 (5th Cir. 1991)). The second step of

the analysis asks whether the plan comes within the safe harbor provision. Promulgated under 29 U.S.C. § 1135, a regulation of the Department of Labor excludes employee insurance policies from ERISA if:

> (1) No contributions are made by an employer or employee organization;
>
> (2) Participation [in] the program is completely voluntary for employees or members;
>
> (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
>
> (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative service actually rendered in connection with payroll deductions or dues checkoffs.

29 C.F.R. § 2510.3-1(j) (1999). In order to qualify under the safe harbor exemption, all four elements must be met.

Here, it is clear that contributions are made by the employer, so The Policy does not meet the first requirement of the safe harbor exemption. Moreover, despite evidence that the majority of participation in the employer's benefit coverages are voluntary, employees may not decline Long Term Disability benefits. Therefore, the second requirement is also not satisfied. The Policy also fails to meet the third element, as Oracle appears to endorse The Policy along with several other plans through its Oracle Flex Benefits Program. As for the fourth element, this Court does not have sufficient evidence to

make a determination at this juncture. Regardless, this Court finds that the safe harbor exemption does not apply to The Policy based on The Policy's failure to satisfy the first three elements of the safe harbor exemption.

Finally, this Court finds that The Policy sufficiently indicates that defendants and plaintiff's employer, Oracle Corporation, established and maintained The Policy with the intent to provide benefits to its employees through The Policy. Consequently, The Policy qualifies as a disability insurance plan under ERISA.

c. DOES THE POLICY RELATE TO AN ERISA PLAN?

Plaintiff's claims are brought in order to recover for benefits allegedly due to him under The Policy. Therefore, this Court finds that plaintiff's state law claims clearly relate to The Policy. Consequently, despite plaintiff's arguments that defendants failed to prove and support that ERISA applies to The Policy, this Court finds that The Policy does qualify as a disability insurance program that falls under ERISA's definition of an employee welfare benefit plan.

3. DOES THE "SAVINGS CLAUSE" OF ERISA APPLY?

Plaintiff's final argument is that the instant action is exempt from ERISA because the Supreme Court's recent trend of limiting the scope of preemption as held in Unum Life Insurance Co. Of America v. Ward provides that plaintiff's bad faith claim be included in ERISA's "savings clause," which exempts from ERISA those state laws that directly regulate insurance.

ERISA's "insurance savings clause" provides that a

state law is not preempted by ERISA if it regulates insurance. 29 U.S.C. § 1144(b)(2). In order to determine whether a state law regulates insurance, the court must first ask whether, from a "common-sense view of the matter," the contested prescription regulates insurance. Unum Life Ins. Co. Of America v. Ward, 119 S.Ct. 1380, 1386 (1999) (citing Metropolitan Life Ins. Co., 471 U.S. at 740; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48 (1987)). Second, the court must consider three factors to determine whether the regulation fits within the "business of insurance" as that phrase is used in the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1011 et seq.:

(1) Whether the practice has the effect of transferring or spreading a policyholder's risk;

(2) Whether the practice is an integral part of the policy relationship between the insurer and the insured; and

(3) Whether the practice is limited to entities within the insurance industry.

See Ward, 119 S.Ct. at 1386 (citing Metropolitan Life, 471 U.S. at 743; Pilot Life, 481 U.S. 48-49). These factors are considerations to be weighed, not separate essential elements that must each be satisfied.[1] See Ward, 119 S.Ct. at 1389.

The District Court in Tutolo v. Independence Blue Cross, CIV.A. No. 98-5928, 1999 WL 274975 (E.D. Pa. May 5, 1999), found that Pennsylvania's bad faith law, 42 Pa.C.S.A. § 8371

[1]Contrary to plaintiff's contentions, the Supreme Court did not rule that the test of whether a law "regulates insurance" constituted solely of a "common sense view of the matter." Rather, the Supreme Court reiterated that the McCarran-Ferguson factors were also "considerations [to be] weighed" in determining whether a state law regulates insurance. Ward, 119 S.Ct. at 1389 (citing Pilot Life, 48 U.S. at 49).

(West 1997), does not fall within ERISA's preemption exemption and granted the defendant's motion to dismiss the claim in that case. Plaintiff argues that the court in Tutolo did not consider the Supreme Court's recent decision in Unum Life Ins. Co. v. Ward and should not apply to the instant case. This Court disagrees. Clearly, the Tutolo court considered Ward, as the opinion cites Ward in outlining the test for determining whether a law "regulates insurance." Tutolo, 1999 WL 274975, at *2. While this Court agrees with plaintiff's argument that the Tutolo memorandum opinion does not serve precedential authority, this Court agrees with the court's analysis in Tutolo.

A common-sense view of "regulates insurance" arguably applies to Pennsylvania's bad faith law, as it is entitled "Actions on insurance policies" and provides a cause of action only when an insured sues her insurer in "an action arising under an insurance policy." 42 Pa.C.S.A. § 8371; See Ruth v. UNUM Life Ins. Co. of America, CIV.A. No. 94-3969, 1994 WL 481246, at *4 (E.D. Pa. Sept. 6, 1994). In fact, Pennsylvania does not recognize tort claims for bad faith breach of contract outside the insurance context. See Ruth, 1994 WL 481246, at *4 (citations omitted).

Upon consideration of the three factors set forth in the "business of insurance test," however, this Court finds that 42 Pa.C.S.A. § 8371 does not fall within the savings clause of ERISA. Section 8371 fails to satisfy the first factor, as the regulation does not serve to transfer or spread the policy holder's risk. It provides the policy holder with a remedy

against the insurer. See Tutolo, 1999 WL 274975, at *3; Clancy v. Ins. Co. of Am., CIV.A. No. 96-1053, 1996 WL 543929, at *3 (E.D. Pa. Sept. 24, 1996). Section 8371 also does not meet the second factor because it is not an integral part of the policy relationship between the insurer and the insured, but rather serves as a resort to which the insured may turn when injured by its relationship with its insurer. See Tutolo, 1999 WL 274975, at *3; Pilot Life, 48 U.S. at 51. Section 8371 therefore fails to meet the "business of insurance" test, does not fall under ERISA's savings clause, and is preempted by ERISA.

This Court finds that plaintiff's state law claim for bad faith is preempted and governed by ERISA and its caselaw progeny. Therefore, defendants' removal of this action to this Court was proper.[2] Accordingly, plaintiff's Motion for Remand and defendants' Motion to Amend Petition for Removal are denied. This Court however grants plaintiff his request for leave to amend his Complaint and allows plaintiff 30 days to file said Amended Complaint. This Court also denies defendants' Motion to Dismiss without prejudice for the present time to allow plaintiff time to refile an Amended Complaint. Defendant may renew its dispositive motion at an appropriate time in the future.

[2]As defendant points out, plaintiff does not argue that Count I of his Complaint, the claim under Pennsylvania Unfair Insurance Practice Act, is exempt from ERISA. Removal is still proper in this case because of this Court's jurisdiction over the federal question presented in the bad faith claim. This Court declines to discuss ERISA preemption as to Count I unless or until the issue is raised again in the future once plaintiff files his Amended Complaint.

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O R D E R

AND NOW, this day of March, 2000, upon consideration of defendants' Motion to Dismiss, plaintiff's Opposition to Removal, plaintiff's Motion for Remand and in the alternative, Opposition to defendants' Motion to Dismiss, Defendants' Opposition to plaintiff's Motion for Remand, and in the alternative, Defendants' Motion to Amend Petition of Removal, this Court hereby ORDERS as follows:

(1) Plaintiff's Motion for Remand is DENIED.

(2) Defendants' Motion to Dismiss is DENIED without prejudice. Defendants may renew its Motion to Dismiss, if necessary, after plaintiff files his Amended Complaint.

(3) Defendants' Motion to Amend Petition for Removal is DENIED as moot, this Court already having found that removal was proper.

(4) It is further ORDERED that plaintiff shall have 30 days from the date of this Order to file an Amended Complaint if he wishes to replead any meritorious ERISA claims.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, S.J.